NO. 43708-2-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

SUSAN K. BROWN and LANCE B. BROWN,
wife and husband,

Appellants,

v.

CITY OF TACOMA, a municipal subdivision of the State of Washington; JOHN L. BRIEHL, individually and in his capacity as Executive Director of the City of Tacoma Human Rights and Human Services Department; and JACQUELINE STRONG MOSS, individually and in her capacity as Manager of the City of Tacoma Human Rights and Human Services Department,

Respondents.

BRIEF OF RESPONDENT CITY OF TACOMA

ELIZABETH A. PAULI, City Attorney

JEAN P. HOMAN
WSB# 27084
Attorney for Respondents

Tacoma City Attorney's Office
747 Market Street, Suite 1120
Tacoma, Washington 98402
(253) 591-5885

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I. INTRODUCTION

Plaintiff Susan Brown was terminated from her position with the City of Tacoma because an independent investigator determined that she violated the City's Ethics Code by using City equipment, time and resources for her personal gain. Plaintiff sued, claiming retaliation for plaintiff making an earlier, unfounded hostile work environment complaint[1].

As outlined herein, the superior court did not err in granting the City's motion for summary judgment and dismissing plaintiff's retaliation claim, as plaintiff cannot establish the essential elements of her claim. The only evidence plaintiff offers of a nexus between her protected conduct and her termination is a double hearsay statement that is not admissible under any recognized exception to the hearsay rule. Further, even if the court were to consider the double hearsay statement offered by plaintiff, her retaliation claim still fails, as a matter of law, as plaintiff adduced no evidence to establish that the City's legitimate, non-retaliatory reason for her termination is pretextual.

[1] Plaintiff also asserted claims for wrongful termination, infliction of emotional distress and defamation, all of which were also dismissed by the superior court, either on motion or by stipulation. CP 290-292; CP 297-300.

Consequently, the City asks that this Court affirm the superior court's order on summary judgment, dismissing plaintiff's retaliation claim in its entirety.

II. STATEMENT OF ISSUES

1. Did the superior court err in holding that the double hearsay statement offered by plaintiff in opposition to the City's motion for summary judgment was not admissible under any recognized exception to the hearsay rule, and thus, could not be considered by the court.

2. Did the superior court err in granting the City's motion for summary judgment on plaintiff's retaliation claim where, under the burden shifting scheme applicable to the claim, plaintiff, at best, established a very weak *prima facie* case and then failed to adduce any evidence to show that the City's legitimate, non-retaliatory reason for her termination was pretextual.

III. STATEMENT OF THE CASE

A. Factual History

In October 2003, plaintiff Susan Brown began working for the City of Tacoma as an Administrative Assistant for the Director of the City's Human Rights and Human Services (HRHS)

Department, John Briehl. CP 6-7. Several years later, in February 2008, the City hired defendant Jacqueline Strong Moss as the Human Rights Manager for HRHS. CP 7. In October 2009[2], plaintiff Susan Brown and another HRHS employee, Frank Gavaldon, made a complaint to the City's Human Resources Department, alleging that Ms. Strong Moss was subjecting them to a hostile work environment. CP 8; CP 149; CP 153-160. The City hired an outside investigator to investigate the hostile work environment complaint brought by plaintiff and Mr. Gavaldon. CP 149; CP 153-160. Following the investigation, the investigator concluded that there was no evidence to establish a hostile work environment or any other type of discrimination on the basis of any protected status, although the investigator did note personality conflicts between the involved parties. Id.

Several months later, during a conversation with another City employee, the Director of Human Resources learned that certain members of the HRHS Department might be engaging in behavior that violated the City's Ethics Code. CP 150. Specifically, an allegation was made that Susan Brown was using City

[2] Plaintiff's complaint mistakenly cites to 2008; the complaint was made in October 2009. CP 153.

equipment during working hours to run a travel business and for other personal reasons, that another employee was using work time and City equipment to shop online, and that the Director of HRHS, John Briehl, knew of the unethical conduct. CP 150-151; CP 162. Pursuant to the Ethics Code (Chapter 1.46 of the Tacoma Municipal Code[3]), the Human Resources Director referred the matter to the City Manager for designation of an investigator. CP150-151; CP 164. The City then retained an outside investigator to investigate the potential ethics violations. CP 151.

As part of the ethics investigation, the City also retained a forensic computer expert to examine Susan Brown's and John Briehl's computers for evidence of inappropriate computer usage. CP 150. The forensic computer expert determined that while Mr. Briehl's computer usage for non-work related activity was not excessive, Ms. Brown's computer usage for non-work related activities was excessive and showed significant personal usage of the Internet over the previous two years. CP 70-76. In fact, the forensic computer expert determined that plaintiff's Internet usage for non-work related activities was high *as compared to usage for*

[3] The Tacoma Municipal Code is available in its entirety on the City of Tacoma's website, at the follow URL: http://www.cityoftacoma.org/Page.aspx?nid=275.

work related activities and the personal usage did not appear to be isolated to short specific times of the day, like the lunch hour. CP 76. Based on the forensic computer expert's report and the interviews that the ethics investigator conducted, the ethics investigator found that Susan Brown had violated the City's Ethics Code by knowingly using her position and City resources for her own personal benefit. See generally CP 81-90; see specifically CP 87-88. Pursuant to the Tacoma Municipal Code, the investigative findings were then referred to the City Manager for a final disposition.

Based on the investigative findings, the Deputy City Manager gave plaintiff notice of his intent to terminate her from her at-will position with the City. CP 92. Plaintiff's employment was subsequently terminated, effective May 12, 2010.

B. Procedural History

Following her termination, plaintiff sued the City of Tacoma, John Briehl and Jacqueline Strong-Moss. CP 4-15. In her complaint, plaintiff alleged, pursuant to RCW 49.60.210, that she was terminated in retaliation for having lodged a hostile work environment complaint against Jacqueline Strong Moss. CP 14. In

addition to her claim of retaliation, plaintiff also claimed that she was entitled to for cause protection and that she was wrongfully terminated. Finally, plaintiff claimed that the defendants had intentionally and negligently inflicted emotional distress on her, and that the defendants defamed her.

The defendants moved for summary judgment on all claims. CP 42-66; CP 230-239. After the defendants' motions were filed, plaintiff stipulated to the dismissal of select claims and to the dismissal of John Briehl from the lawsuit. CP 297-300. The parties proceeded with the motions for summary judgment on all remaining claims and the defendants' motions were granted by the superior court. CP 290-296.

Plaintiff subsequently moved for reconsideration of the dismissal of her retaliation claim only. CP 301-305. The superior court denied plaintiff's motion for reconsideration and plaintiff timely filed a notice of appeal for the superior court's orders relating to her retaliation claim.

IV. ARGUMENT

RCW 49.60.210(1) forbids employers from discharging or otherwise discriminating against an employee in retaliation for

opposing practices forbidden by Washington's Law Against Discrimination. To avoid summary judgment, the employee must first establish the elements of a *prima facie* case of retaliation: (1) The employee engaged in a statutorily protected activity; (2) the employer took adverse employment action against her; and (3) there is a causal link between the protected activity and the adverse action. Crownover v. Dep't of Transp., 165 Wn. App. 131, 148, 265 P.3d 971 (2011). To show a causal connection, a plaintiff must show that retaliation was a substantial motivating factor in the adverse employment action. Allison v. Housing Auth., 118 Wn.2d 79, 95-96, 821 P.2d 34 (1991).

Once a *prima facie* case is established, the burden then shifts to the employer to show a legitimate, non-retaliatory reason for the adverse employment action. Crownover, 165 Wn. App. at 148. If the employer shows a legitimate reason, the burden shifts back to the employee to show that this legitimate reason was pretextual. Id. See also Hill v. BCTI Income Fund-I, 144 Wn.2d 172, 180-81, 23 P.3d 440 (2001) (noting that Washington courts have adopted the burden-shifting proof mechanism of federal courts outlined in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973)), superseded by

statute on different grounds. *But if the employee fails to demonstrate, with competent evidence, that the reasons given by the employer are not worthy of belief, the employer is entitled to dismissal as a matter of law.* Renz v. Spokane Eye Clinic, P.S., 114 Wn. App. 611, 619, 60 P.3d 106 (2002).

In the instant case, the City does not dispute that plaintiff can establish the first (protected activity) and third (adverse employment action) elements of her *prima facie* case. In response to the City's motion for summary judgment, however, plaintiff failed to adduce any competent, admissible evidence of a causal connection between her protected activity and her termination.

In support of the causation element of her retaliation claim, the only "evidence" plaintiff offered was a self-serving and uncorroborated double hearsay statement. CP 246. See also CP 261-262 (deposition pages 125-126). In her deposition, plaintiff claimed that John Briehl (Director of HRHS) told plaintiff that Eric Anderson (the City Manager) told Briehl that "one of you [plaintiff, Frank Gavaldon, Jacqueline Strong Moss] would get fired" over the situation involving these three employees. CP 261-262. Plaintiff's claim that this statement was made by either man is not corroborated by any other witness, such as Mr. Briehl or Mr.

Anderson. Moreover, this statement ("Briehl said that Anderson said") is double hearsay and neither level of hearsay is admissible under any recognized exception to the hearsay rule. Further, even if the court were to consider this statement, it would be insufficient to defeat summary judgment under the applicable legal standards, as plaintiff has adduced no competent evidence of pretext.

A. The double hearsay statement offered by plaintiff is not admissible under any recognized exceptions to the hearsay rule.

Hearsay is an out-of-court statement offered for the truth of the matter asserted. ER 801(c). Hearsay is inadmissible unless a specific exception to the hearsay rule applies. ER 802; City of Bellevue v. Raum, 171 Wn. App. 124, 150, 286 P.3d 695 (2012). Moreover, where multiple levels of hearsay are involved, each level must meet an exception to the hearsay rule in order to be admissible. ER 805; In re Det. Of Coe, 175 Wn.2d 482, 505, 286 P.3d 29 (2012). On summary judgment, the party offering the hearsay statement bears the burden of showing that the statement is admissible under an exception to the hearsay rule. Spokane Research & Def. Fund v. Spokane County, 139 Wn. App. 450, 462, 160 P.3d 1096, rev. denied, 139 Wn.2d 450 (2007).

In the instant case, plaintiff has offered a double hearsay statement ("Briehl said that Anderson said") without establishing any recognized exception to the rule against hearsay for either level. In fact, in her appeal, plaintiff does not even address the hearsay rule or argue that any particular exceptions to the rule apply[4]. See Opening Brief of Appellant, p. 9-11. In the superior court, plaintiff argued that the proffered statement was not hearsay because it was offered against a party opponent (Briehl) and Briehl was acting as the City Manager's (Anderson's) agent. CP 303-304. As outlined herein, plaintiff's argument has no merit.

First, contrary to plaintiff's assertion, Mr. Briehl is no longer a party to this lawsuit. Because plaintiff had failed to assert any actionable claims against Mr. Briehl, she stipulated to his dismissal from this lawsuit. CP 297-300. Further, the stipulation was entered prior to the superior court hearing and ruling on the motion for summary judgment. Given that Mr. Briehl was not a party at the

[4] Since an appellate court reviews an order on summary judgment *de novo*, plaintiff's failure address the rule against hearsay and establish an exception for both levels of hearsay negates any reliance on this statement. Given that plaintiff has failed to carry her burden in establishing the admissibility of the hearsay statement, this court should give the proffered statement no consideration in deciding whether the City is entitled to judgment, as a matter of law, on plaintiff's retaliation claim. Burton v. Twin Commander Aircraft, LLC, 171 Wn.2d 204, 212, 254 P.3d 778 (2011). See also Satomi Owners Ass'n v. Satomi, 167 Wn.2d 781, 808, 225 P.3d 213 (2009) (appellate court can decline to review an issue neither raised nor briefed on review).

time of summary judgment and would not be a party if this case were to proceed to trial, the first level of hearsay cannot be exempted from the rule against hearsay as a statement by a party opponent. See ER 801(d)(2).

Second, with regard to the statement allegedly made by Eric Anderson, plaintiff offered no evidence to establish that Mr. Briehl was an authorized speaking agent for Mr. Anderson on this issue. "In order to fall under the rule, the declarant must be authorized to make the particular statement at issue, or statements concerning the subject matter, on behalf of the party." Passovoy v. Nordstrom, Inc., 52 Wn. App. 166, 170, 758 P.2d 524, review denied, 112 Wn.2d 1001 (1988). "When a person does not have specific express authority to make statements on behalf of a party, the overall nature of his authority to act for the party may determine if he is a speaking agent." Id. The declarations of the agent, however, may not be used to establish the fact of agency; the fact of agency must be established by other evidence. Id. at 171-172. Thus, "[i]ndependent proof of the existence of the agency and its scope must be shown." Id. See also Lockwood v. AC&S, Inc., 109 Wn.2d 235, 262-263,744 P.2d 605 (1987) (admissibility determined not by the form of the statement, but rather by whether the

statement was made within the authorized scope of the speaker's duties).

In the instant case, the record is devoid of evidence to establish that John Briehl was authorized to speak for Eric Anderson on this issue. Instead, in the superior court, plaintiff simply argued that the court should assume that because Mr. Briehl was the "Executive Director" of the Human Rights and Human Services Department (HRHS), he was authorized to speak for "the City of Tacoma." CP 303-304. Plaintiff's argument, however, asks too much. The City of Tacoma is an extensive entity, with many departments and many officials. Plaintiff failed to offer any evidence as to the nature or the scope of Mr. Briehl's authority, nor did she offer any explanation as to why Mr. Briehl would have been authorized to speak for the City Manager on this issue, as compared to any other issue or any other executive. Instead, she asked the superior court to simply assume that such authority existed. This the court could not do. RP 21. See also Grimwood v. University of Puget Sound, Inc., 110 Wn.2d 355, 753 P.2d 517 (1988) (on summary judgment, court can only consider facts and evidence which would be admissible at trial, as set forth in CR 56(e)).

In short, plaintiff did not and cannot establish a recognized exception for either layer of the hearsay statement she has offered and consequently, her testimony about this alleged statement is not admissible. Moreover, under these circumstances, the double hearsay statement offered by plaintiff has no indicia of reliability and is extremely self-serving. State v. Thomas, 150 Wn.2d 821, 853, 83 P.3d 970 (2004) ("The reliability of hearsay testimony is presumed only where the statement contains particularized guaranties of trustworthiness.") The superior court did not err in finding that the proffered double hearsay statement was inadmissible and could not be considered on summary judgment.

B. Plaintiff failed to establish that the City's proffered reason for termination was pretextual and thus, summary judgment on this claim was proper.

As outlined herein, if the plaintiff is able to establish a *prima facie* case of retaliation (protected activity, adverse employment action and a causal connection between the two), the burden then shifts to the employer to show a legitimate, non-retaliatory reason

for the adverse employment action[5]. Crownover v. Dep't of Transp., 165 Wn. App. 131, 148, 265 P.3d 971 (2011). If the employer shows a legitimate reason for its action, the burden shifts back to the employee to show that this legitimate reason was pretextual. Id. See also Milligan v. Thompson, 110 Wn. App. 628, 42 P.3d 418 (2002). But if the employee fails to demonstrate, *with evidence*, that the reasons given by the employer are not worthy of belief, the employer is entitled to dismissal as a matter of law. Milligan, 110 Wn. App. at 638. In other words, to overcome an employer's summary judgment motion, an employee must cite *facts*, and not just conclusions, in support of her claim. Grimwood v. University of Puget Sound, Inc., 110 Wn.2d 355, 359-360, 753 P.2d 517 (1988). If the employee does not offer admissible evidence to establish that the proffered reason is pretextual, then

[5]It is the City's position that plaintiff has, in fact, not established her prima facie case. To begin, as outlined herein, the double hearsay statement at issue is not admissible and cannot be considered on summary judgment. Moreover, plaintiff's own testimony establishes that she has no evidence that the decision to terminate her employment was motivated by retaliation: "Q: Sure. Do you have knowledge of any specific facts that would indicate that the decision to terminate you was motivated in whole or in part by your hostile work environment complaint? A: I do not but I think it's pretext." (emphasis added) CP 126. Moreover, the timing of plaintiff's termination in relation to the hostile work environment is not probative of retaliatory intent, given that the other employee who also made the hostile work environment complaint, Frank Gavaldon, was not terminated. Id.

the employer is entitled to dismissal of the claim. Milligan, 110 wn. App. at 637-638.

The City recognizes that the plaintiff was not required to adduce direct evidence of pretext in order to survive summary judgment; indirect or circumstantial evidence is sufficient. Chen v. State, 86 Wn. App. 183, 190, 937 P.2d 612 (1997). In order to establish a question of fact as to pretext, however, plaintiff must adduce evidence to show that "(1) the employer's reasons have no basis in fact; or (2) even if the reasons are based on fact, the employer was not motivated by the reasons; or (3) the reasons are insufficient to motivate the adverse employment decision." Id.

Further, for both discrimination and retaliation claims, Washington courts have adopted a "hybrid-pretext" standard of proof. Milligan, 110 Wn. App. at 638-639 (citing Hill v. BCTI Income Fund-I, 144 Wn.2d 172, 182, 186, 23 P.3d 440 (2001), superseded by statute on other grounds). Under the "hybrid-pretext" standard,

> [w]hether judgment as a matter of law is appropriate in any particular case will depend on a number of factors. Those include the strength of the plaintiff's prima facie case, the probative value of the proof that the employer's explanation is false, and any other evidence that supports the employer's case and that properly may be considered on a motion for judgment as a matter of law.

Hill, 144 Wn.2d at 186 (quoting Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133, 148-149, 120 S.Ct. 2097, 147 L.Ed.2d 105 (2000)). Under this standard, "[a] court may grant summary judgment even though the plaintiff establishes a prima facie case and presents some evidence to challenge the defendant's reason for its action." Milligan v. Thompson, 110 Wn. App. 628, 637, 42 P.3d 418 (2002). If the "'record conclusively reveal[s] some other, nondiscriminatory reason for the employer's decision, or if the plaintiff create[s] only a weak issue of fact as to whether the employer's reason [i]s untrue and there [i]s abundant and uncontroverted independent evidence that no discrimination ha[s] occurred,'" summary judgment is proper. Id.

Under the "hybrid-pretext" standard, the record in the instant case will support only one conclusion. Even if the court were to find that the double hearsay statement offered by plaintiff was admissible for purposes of summary judgment, all this statement does is provide weak evidence of a causal connection between plaintiff's hostile work environment complaint and her termination. In other words, the double hearsay statement serves only to create a very weak *prima facie* case. This statement does not, however, provide any evidence of pretext and a review of the record created

on summary judgment reveals that plaintiff offered literally no evidence to show that the City's proffered reason for her termination was not worthy of belief or was otherwise pretextual.

Plaintiff argues, as she did in the superior court, that the independent investigator concluded that John Briehl also misused his computer and the failure to discipline Briehl is evidence of retaliatory motive and pretext. Plaintiff's argument has no merit. CP 75-76. First, ethics investigator did not conclude that John Briehl had misused his computer. CP 87-89. The computer forensic examiner who analyzed both plaintiff's and Mr. Briehl's computer hard drives concluded that although both employees had used their computers for non-City business, Mr. Briehl's Internet usage did not appear unusual or excessive. CP 75-76. Plaintiff's usage of her City computer for non-business purposes, however, appeared high; the investigator determined that based on a review of the data, plaintiff had used her City computer for significant personal usage in the preceding two years prior, and this personal usage was not isolated to short specific times of the day such as lunch hours. Id.

Second and contrary to plaintiff's argument, the ethics investigator did not conclude that John Briehl had also violated the

Ethics Code. CP 87-89. Based upon the forensic computer expert's report and the interviews the ethics investigator had conducted, the ethics investigator concluded that Susan Brown had violated the City's Ethics Code by using City equipment and resources – during business hours – for her own personal benefit. CP 87-88. And while plaintiff may disagree with the City's determination that her internet usage so far exceeded *de minimis* usage so as to be violative of the City's Ethics Code, plaintiff admits that she used the City's property to research setting up her own personal travel business[6]. CP 124. The ethics investigator did not, however, make similar findings for Mr. Briehl. CP 87-89. Instead, the ethics investigator concluded that Mr. Briehl either knew or should have known of plaintiff's activities. Id. Unlike his findings about the plaintiff, the ethics investigator did not conclude that Mr. Briehl had knowingly violated the City's Ethics Code. Id.

[6] Plaintiff, at her deposition, when confronted with the scope of her personal Internet usage, contends that she could not have gotten her work done if the report was accurate. CP 128-129. However, she admits there is no evidence that anyone else used her computer to access. CP 132. Moreover, she admitted to the investigator retained by that City that she did conduct personal research on the City's computer; used the City's printers for personal business; arranged personal travel for family; conducted personal banking; checked Facebook. CP 83. Plaintiff's after the fact attempt to characterize her computer usage as *de minimis* is disingenuous, at best.

Further, plaintiff's contention that Mr. Briehl was not disciplined as a result of this investigation is equally flawed. As she did in the superior court, plaintiff claims that "no sanction whatsoever was imposed against Mr. Briehl." Appellant's Opening Brief, p. 10. Plaintiff cites no evidence, however, to support this assertion. And contrary to plaintiff's claim, the record is actually silent on whether the City took any action with Mr. Briehl as a result of this investigation. There is simply no evidence about this issue in the record at all, and the absence of evidence does not and cannot establish an affirmative fact. The best that can be said is that there is no evidence in the record as to what happened to Mr. Briehl as a result of this investigation.

Plaintiff failed to adduce any competent, admissible evidence to establish that the City's legitimate, non-retaliatory reason for her termination was pretextual. She offered no evidence to establish that the investigator's findings had no basis in fact. She offered no evidence to establish that, even if the investigator's findings were grounded in fact, the decision to terminate her employment was not motivated by the investigator's findings. And she offered no evidence to establish that the misuse of City equipment, personnel and time, in violation of the City's Ethics

Code, was an insufficient basis for termination. In sum, plaintiff offers only her own bald and conclusory opinion that the decision to terminate her for violating the Ethics Code was prextual. Under the hybrid-pretext standard, this evidence is simply not sufficient to withstand summary judgment.

The evidence, taken in the light most favorable to plaintiff and even if the Court were to consider the double hearsay statement, creates only a very weak prima facie case, with no evidence to establish pretext. Under these circumstances, the City was entitled to judgment as a matter of law and the superior court did not err is so finding.

V. CONCLUSION

As outlined herein, the superior court did not err in finding that the double hearsay statement proffered by plaintiff in response to the City's motion for summary judgment was inadmissible and could not be considered on summary judgment. Further, with or without consideration of this statement, the superior court correctly determined that the City was entitled to judgment as a matter of law on plaintiff's retaliation claim.

Without consideration of the double hearsay statement, plaintiff has not even established her *prima facie* case of retaliation, as there is no evidence of a causal nexus between her protected activity and the decision to terminate her employment. Moreover, even if the double hearsay statement is considered by the court, this statement only serves to create a very weak *prima facie* case and does nothing to show that the City's legitimate, non-retaliatory reason was pretextual. An independent investigator determined that plaintiff had used City resources, personnel and equipment for her own personal gain, in violation of the City's Ethics Code. Absent strong evidence of pretext – evidence that plaintiff utterly failed to adduce – the City is entitled to judgment as a matter of law.

Therefore, the City respectfully asks this Court to affirm the superior court's grant of summary judgment on this claim.

DATED this 19th day of February, 2013.

ELIZABETH A. PAULI, City Attorney

By: _____

JEAN P. HOMAN
WSBA# 27084
Attorney for Respondent

CERTIFICATE OF SERVICE

The undersigned hereby declares under penalty of perjury under the laws of the State of Washington that on the 19th day of February, 2013, she caused the foregoing *BRIEF OF RESPONDENT'S CITY OF TACOMA* to be served on the following parties of record via electronic service, pursuant to agreement of the parties.

Brett A. Purtzer, WSBA #17283
Hester Law Group, Inc., P.S.
1008 South Yakima Avenue, Suite 302
Tacoma, WA 98405
Brett@hesterlawgroup.com

DATED this 19th day of February, 2013.

JEAN P. HOMAN, WSBA #27084